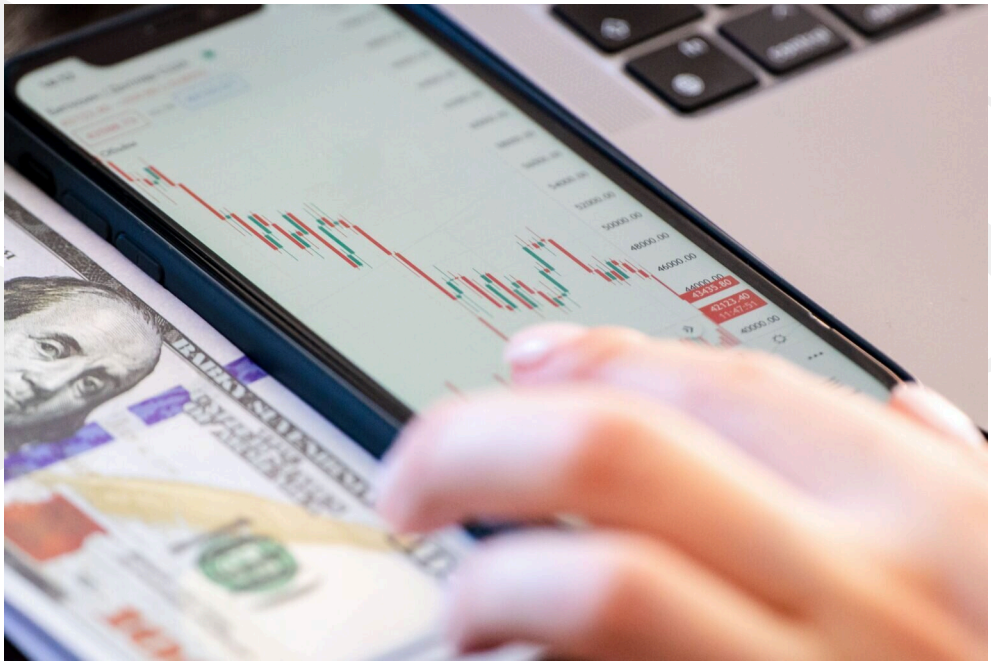
Who Owns the Crypto When a Platform Fails? What the CFTC Can Learn from Retail Forex Regulation

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Consider a retail customer who deposits $10,000 on a trading platform, borrows from the platform and buys a crypto asset worth several times that deposit. Weeks later the platform fails. Does the customer get the asset back, or do they join the queue of unsecured creditors? On 8 October 2026 the Commodity Futures Trading Commission (the Commission) issued an advanced notice of proposed rulemaking on leveraged retail trading of crypto assets (the notice), and comments are due on 14 December 2026 (Commodity Futures Trading Commission [CFTC], 2026a, pp. 64811, 64840). Footnote 300 of the notice shows where the problem lies: a lender cannot hold a security interest in the assets of a segregated account, while

the notice lets the lender take security in the account that holds the purchased asset (CFTC, 2026a, p. 64833). One asset cannot sit in both places, so the Commission has to choose, and the choice decides whether the customer ends up where the customers of FTX's CFTC-registered entity ended up or where retail foreign exchange (forex) customers stand today. This article asks what the Commission can learn from retail forex regulation.

The article keeps to the Commodity Exchange Act and the Bankruptcy Code and leaves out securities law and state law. The question matters in theory, because the Act sends retail forex and retail crypto trading down two routes within one section. The notice asks about the account, the capital regime and the commodity contract (CFTC, 2026a, pp. 64833, 64837, 64838). It matters in practice because of the money involved. As of 31 August 2026, six firms reported $470 million of retail forex obligations and four of them, owing $387.5 million, reported no segregated customer funds (CFTC, 2026b). Keeping crypto customers from ending up in the same position as retail forex customers comes down to three things: a segregated asset, a commodity contract and other collateral for the lender. Where the Commission declines one of these, it should copy a forex tool only if the reason behind that tool still applies.

The analysis examines the primary texts: the statutes, the Commission's rules, its 2010 final rule, the notice and the rules of the National Futures Association, the self-regulatory body of the futures industry. The article has three parts. The first section compares the two routes in the statute. The second answers three questions about the customer's money and the third tests which forex tools are worth borrowing.

1. Two Routes in One Statute

Many readers assume that leveraged crypto trading already follows the forex rules, because Congress put both in section 2(c)(2) of the Commodity Exchange Act. It does not. For foreign currency, Congress created the registered retail foreign exchange dealer, fixed its capital floor at $20,000,000 and gave the Commission express power to write rules (Commodity Exchange Act, 2026, § 2(c)(2)(B)(i)(II), (ii)(III), (v)). For any other commodity, which includes crypto assets, the Act only applies its provisions concerning futures trading and fraud "as if" the retail transaction were a futures contract (Commodity Exchange Act, 2026, § 2(c)(2)(D)(iii)). The first route gives the Commission a dealer to regulate and the second asks it to treat a retail trade as a future.

The routes meet at the intermediary. The Act counts as a futures commission merchant any person who acts as counterparty to a retail commodity transaction or a retail forex transaction under section 2(c)(2)(C) and accepts margin money (Commodity Exchange Act, 2026, § 1a(28)(A)). Part 5 of the Commission's rules sets capital requirements for such firms that offer retail forex (Off-Exchange Foreign Currency Transactions, 2025,

§§ 5.6, 5.7). A forex rule still has to fit a structure in which the customer holds an asset, not a claim for a sum of money.

2. Three Questions About the Customer's Money

Start with the forex customer, whose position the Commission has addressed. They rely on the dealer's promise to pay a deposit adjusted for profit or loss, which the rules call the retail forex obligation (Off-Exchange Foreign Currency Transactions, 2025, § 5.1(l)). In 2010 the Commission explained why it did not require segregation: under the Bankruptcy Code, customer money held for retail forex trading "would not receive any preferential treatment to unsecured creditors in bankruptcy" (CFTC, 2010, p. 55416). The forex customer therefore has no bankruptcy priority, because the Commission's rules exclude retail forex from the term "commodity contract" (Bankruptcy Rules, 2025, § 190.00(d)(3)(iv)). What remains is the firm's capital, the assets the firm holds against its obligation and a written warning.

Customers of FTX's CFTC-registered entity stand at the other end. Their assets "remained properly segregated" and they "emerged from FTX's collapse largely unscathed" (CFTC, 2026a, pp. 64814, 64825). The Bankruptcy Code then pays customer property "in priority to all other claims" (Bankruptcy Code, 2026, § 766(h)). A crypto customer can end up on either side, and the outcome comes down to three questions. First, where is the asset held? Second, does the position qualify as a commodity contract? Third, who holds a security interest in the asset?

The first question is where the asset is held and the notice leaves that choice open: the account may be "a Section 4d-compliant segregated account or a delivery account" (CFTC, 2026a, p. 64833). The Commission's rules require a futures commission merchant to keep futures customer funds segregated (Futures Customer Funds to Be Segregated and Separately Accounted for, 2026, § 1.20). Under Part 190, property held in a delivery account still counts as customer property, even though it is not subject to a special segregation requirement (Bankruptcy Rules, 2025, § 190.00(c)(3)(i)(B)). The article's answer is that a leveraged position belongs in a segregated account, because priority protects only the property that is still there and a segregation duty is the rule that keeps it there.

The second question is whether the position counts as a commodity contract, because only a commodity contract triggers the priority. A trade cleared by a clearing organisation falls within the definition by statute (Bankruptcy Code, 2026, § 761(4)(F)(ii)) and the notice asks by what analysis an uncleared trade can count as "similar to" the contracts that the Bankruptcy Code lists (CFTC, 2026a, p. 64838). The notice describes a crypto asset market as a subcategory of designated contract market (CFTC, 2026a, p. 64831) and Part 190 excludes an off-exchange retail commodity transaction only if it is not traded on a designated contract market as, or as if, a

futures contract (Bankruptcy Rules, 2025, § 190.00(d)(3)(vi)), but not being excluded is not enough; § 761(4) must still be met. The difficulty lies in delivery, since in a typical trade, title passes through a book entry (CFTC, 2026a, p. 64832). So only a cleared trade clearly counts.

The third question is who holds security in the asset. The notice says the lender "may obtain a security interest" in the account that holds the purchased asset "or other collateral", and footnote 300 adds that, under the current framework, a lender cannot have a security interest in the assets of a segregated account (CFTC, 2026a, p. 64833). The asset therefore cannot be both segregated and pledged to the lender. Bitnomial's rules already exclude its cleared spot collateral from segregation (Bitnomial Exchange, LLC, & Bitnomial Clearinghouse, LLC, 2026, Rule 514(3)). The answer is for the lender to take other collateral, because a security interest in the purchased asset pushes it out of segregation. Owning the asset does not by itself decide how well the customer is protected if the platform fails. A customer with all three answers stands where FTX's protected customers stood and one who lacks any one moves closer to where forex customers stand.

3. Which Forex Tools Are Worth Borrowing

Should the Commission copy the forex rules whenever it declines one of the three answers? A forex tool deserves borrowing only if the Commission's reason for it still exists. In 2010 the Commission gave its reasons for several of these tools (CFTC, 2010, pp. 55411–55416). The test is this article's own proposal, not a standard of the Commission.

Three forex tools meet the test. The first is capital: the rule requires at least $20,000,000 plus five per cent of the retail forex obligation above $10,000,000 (Off-Exchange Foreign Currency Transactions, 2025, § 5.7), because customers "are direct counterparties to the firm and therefore exposed to the credit risk of such firm" (CFTC, 2010, p. 55413). The second is the signed warning that the funds a dealer holds "may be treated as an unsecured creditor's claim" (Off-Exchange Foreign Currency Transactions, 2025, § 5.5(b)(3)). The third is the process for setting deposit floors, in which the rule fixes a minimum, the National Futures Association sets the level above it and a review follows every year (Off-Exchange Foreign Currency Transactions, 2025, § 5.9; National Futures Association, 2026a, § 12). The Commission should adopt the process but not the forex figures of two and five per cent.

A fourth tool needs adaptation. The forex rules require a firm to hold assets at least equal to its retail forex obligation and named institutions report the balances to the National Futures Association (Off-Exchange Foreign Currency Transactions, 2025, § 5.8; National Futures Association, 2026a, § 14). That test counts money. A crypto customer is owed a specific asset, so a crypto version has to count each asset separately. This article

proposes coverage asset by asset, with the custodian reporting balances to a regulator.

One tool is worth borrowing only in part. The results statistic shows the share of accounts that were profitable in each of the last four quarters (Off-Exchange Foreign Currency Transactions, 2025, §§ 5.5(e), 5.18(i)). It addresses a dealer taking the other side of the customer's trade, creating what the Commission called a "zero-sum game" (CFTC, 2010, p. 55412). An exchange does not trade against its customers, but a lender or an affiliated market maker may. Dealer conduct rules on price transparency therefore fall away where the firm is not the counterparty (National Futures Association, 2026b, Rule 2-36).

Conclusion

Retail forex regulation shows what a leveraged retail customer is left with when their money has no bankruptcy priority: the firm's capital, assets held against its obligation and a written warning. Three conditions keep crypto customers from that position. The asset stays in a segregated account, the position is a commodity contract and the lender takes other collateral. Where the Commission declines one of them, the forex tools for capital, warnings and deposit floors deserve borrowing. The comparison has its limits, since forex customers hold a claim, crypto customers hold an asset and the notice contains no rule text. Future research can examine whether an uncleared leveraged crypto trade is "similar to" the contracts listed in the Bankruptcy Code (Bankruptcy Code, 2026, § 761(4)(F)(i)) and how asset-by-asset coverage works in practice. Until the Commission chooses, the customer in the opening scene cannot know what they own when the platform fails.

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